***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

# 76-1462

In The

## United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

-against-

LAMONT FLOYD and PETER OLIVO,

*Defendants-Appellants.*

B P/S

# BRIEF FOR DEFENDANT-APPELLANT PETER OLIVO


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## Preliminary Statement

The defendant was charged under indictment No. 76 CR 296, with bank robbery in violation of Title 18, U.S.C. §2113 (a) and (d). After a trial before the Hon. George C. Pratt the jury found the defendant guilty on both counts. On October 1,

1976, the court sentenced the defendant to ten (10) years imprisonment under the terms of the Youth Corrections Act.

## STATEMENT OF THE FACTS

The government proved that on October 31, 1975 the Chase Manhattan Bank on Rutland Road in Brooklyn was robbed by three armed men wearing halloween masks. *(Tr 19-20). Mr. Louis, a bank guard, was able to describe the robbery and give general descriptions of the participants, but was unable to identify either of the defendants as the robbers. (Tr 20-40). Mr. Brown, the Assistant Manager, testified that he activated the bank camera, but he was also unable to identify either of the defendants as being one of the participants to the robbery. Mr. Brown's records showed a loss to the bank to be $8,591.00 (Tr 81-85). Pictures of the bank robbery, depicting three masked gunmen, were thereafter introduced into evidence. (Tr 101-102).

The case against the defendant, Peter Olivo, rested almost entirely upon the testimony of Mr. King who stated that he was an accomplice who assisted both the defendants and a Mr. Almestica in robbing the bank. (Tr 110-168). He

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*Tr - Transcript of the Trial

testified that he drove a stolen car with Lamont Floyd Peter Olivo, and Edwin Almestica to the vacinity of the bank. He remained in the car while the other three went around the corner to the bank. When the three returned carrying a burlap bag, they entered the car and returned to an apartment at 843 Saratoga Avenue where the robbery was planned. (Tr 149-158). Present, while the proceeds of the robbery were being counted in the apartment were the deferdants, Edwin Almestica, Xavier King, two girls, Van and Debbie, Bany "Tuba" McDaniels, and "Little Mike". (Tr 157-163). Other than Mr, King, none of the other persons present at the apartment were called as witnesses for the government.

James Duffin, a state inmate serving a term for robbery, testified pursuant to an agreement with the government, that on November 1, 1975 he assisted Peter Olivo in burning the stolen car used in the bank robbery while it was parked on the corner of Strauss and Riverdale. He also testified that Peter Olivo told him that he and Lamont Floyd had robbed the bank. He also testified that the arson of the automobile was witnessed by a man standing on the stoop of the building where the car was parked.

(Tr 290-300).

Beverly Boston, called as a defense witness testified that Solomon Bornese, Peter Olivo and she were at Mr. Bornese's store located at 1568 Broadway, Brooklyn, New York, the entire day that the bank was robbed. (Tr 593-598). She also described the unsuccessful efforts she made to locate Mr. Bornese in order to call him as a witness for Mr. Olivo. (Tr 599).

.. Olivo testified that h[illegible]s at his cousin, Solomon Bornese's store and [illegible]artment during the entire day of October 31, 1975. [illegible] testified that he slept at his cousin's apartment the night before and that he met Beverly Boston there the next day at approximately 10:30 am and remained with her into the evening. (Tr 655-665). He denied telling Mr. Duffin that he robbed the bank. He also denied burning the car. (Tr 666).

## QUESTION PRESENTED

Whether the prosecutors summation on missing witnesses deprived the defendant of his right to rely upon the government's failure of proof?

## ARGUMENT

## POINT I

### PROSECUTOR'S SUMMATION DEPRIVED THE DEFENDANT OLIVO OF HIS RIGHT NOT TO OFFER ANY EVIDENCE

During summation, Mr. Olivo's defense counsel commented on the failure of the government to call other witnesses to establish whether Peter Olivo was the person who burned the stolen car (Tr 858), or whether he was present in the apartment at 843 Saratoga Avenue (Tr 860).

In his rebuttal summation, the prosecutor stated:

> "I would like to address myself to one argument that Mr. O'Brien made in one form and Mr. Warburgh made in a slightly different form. And that is, where are the missing witnesses.
>
> Now, ladies and gentlemen, the Government has subpoena powers. The defense has subpoena powers. The defense exercised its subpoena powers by calling certain witnesses. Those witnesses are equally available to the defense and to the Government. If the defense felt that there were witnesses out there--that man on the stoop whom Mr. O'Brien just mentioned to you -- that people who might have been in the apartment at 843 Saratoga Avenue when Peter Olivo and Lamont Floyd planned the bank robbery could have helped them, don't you think they would have called them? Of course they would.
>
> But did they? No.
>
> So when Mr. O'Brien asks you to find a reasonable doubt based on the Government's failure to call addi-

tional witnesses, ask yourselves: Why didn't Mr. O'Brien call them? Why didn't Mr. Warburgh call them?

If these witnesses had testimony favorable to the defense, don't you think they would have called them?" (Tr 864).

Thereafter both defense counsel objected to the prosecutor's remarks and requested a mistrial. (Tr 869). The court inquired as to why the prosecutor should be prohibited from commenting upon the absence of witnesses since the issue was raised by the defense. Defense counsel replied that the witnesses were unavailable since they were unknown to the defense until other witnesses mentioned them in their testimony at trial. The court concluded that there was nothing in the record to show that the witnesses were unavailable to the defense and denied the motion for a mistrial. (Tr 870-872).

Thereafter, the court charged the jury, in pertinent part, as follows:

"A defendant is not obligated to present evidence in his favor. He had the right to rely on the failure by the Government to prove its case. He may also rely on evidence brought out on cross-examination of witnesses called by the Government. On the other hand, a defendant has the power to subpoena anyone in support of his position if he so chooses, and he may exercise that power, if he chooses." (Tr 878).

We submit that the prosecutor's summation on the missing witnesses entitled the defendant to a mistrial since it denied

him his right not to produce evidence and to rely upon the government's failure to meet its burden. We further contend that the court's charge rather than curing the error buttressed the government's position and failed to correctly inform the jury of the applicable provisions of law.

Some of the facts in United States v. Crisona, 416 F.2d 107 (2 Cir. 1969) are very similar to those herein. In Crisona, defense counsel called attention to the government's failure to call certain witnesses. In reply, the prosecutor commented that the defense could have obtained those witnesses by subpoena. Unlike the facts herein, however, the defendant did not assert that the witness was unavailable to him and the court charged therein at 416 F.2d 107, 118, as follows:

> "During summations there was considerable reference to where a certain witness was and to the fact that he wasn't called. In a federal criminal trial both the government and a defendant are entitled to receive from the clerk of the court a subpoena calling for the attendance of a witness, and no matter where the witness lives in the United States, he is required to appear when served with such a subpoena.
>
> Now, X or Y or Z could have been called by either side as a witness, so that from the failure of either side to call him or them you may infer that his or their testimony might have been unfavorable to either the government or to a defendant, but it is equally within your discretion to draw no inference at all from the failure of the government or a defendant to call X or Y or Z."

This court concluded that the charge, was proper, and held that the appellant's contention to be without merit.

That decision is distinguishable from our case since (i) the defendant herein did assert that the witnesses were unavailable to him and (ii) the charge herein supported the government's contention and undermined the defendant's contention. In other words, in Crisona the court correctly advised the jury under what circumstances the jury could draw unfavorable inferences against either side. Under our facts the court in substance asserted that the prosecutors summation on the missing witnesses was correct.

In United States v. Brown, 511 F.2d 920 (2 Cir., 1975) defense counsel commented about the unfavorable inference that could be drawn from the failure of the government to produce proof about a getaway car. The court stated that it did not agree with the statement made by counsel. Thereafter the court charged at 511 F.2d 920, 925:

> "However, Mr. Cohn said that you may infer from the failure of the Government to produce those two witnesses that if they were produced they would give testimony that would weaken the Government's case or contradict Mr. Roland. That's where I differ with Mr. Cohn. You should be advised that even though the defendant need not produce proof, he still has the power to subpoena anyone he wants to and where we find, and where witnesses are controlled by neither party, or putting it affirmatively, are under the equal control of the parties, you may not draw an adverse inference from the Government's failure to produce the witness."

The court held that the defendant's right to rest upon the prosecution's burden of proof was in no way infringed since the court "explicitly and repeatedly instructed that the jury may not draw any unfavorable inferences from the defendant's failure to offer any proof."

The court in Brown also found at 511 F.2d 920, 925 as follows:

> "Claim is also made by Brown that it was reversible error for the trial judge to instrict that if a witness is "under equal control" of the parties no adverse inference could be drawn from the failure of the Government to produce the witness. If there was an equally available witness this charge might well be error. Here, however, evidence as to the stolen car was equally unavailable to both sides, making an adverse inference against either side impermissible."

Under our facts we contend that the witnesses were not either equally available or unavailable to both sides. The prosecution was aware of the names of those witnesses well in advance of trial and their names were not disclosed to the defense until the middle of trial. Moreover, the record does not disclose whether the government interviewed those witnesses or whether they were accessible for the service of a subpoena. In addition, availability may well depend, among other things, upon the witnesses relationship to one or the other parties, and testimony that they might be expected to give in the light

of any previous statements or declarations they may have made about the facts of the case. 2J Wigmore §288 at 73-74 (1964 Supp.)

Accordingly, we submit, that the prosecutor's summation was a misstatement of the law which deprived the defendant Olivo of his right to rely upon the prosecution's failure of proof which entitled him to either a mistrial or a curative instruction.

In the event this court determines that the appellant is not entitled to a reversal, we respectfully submit that the court should remand the case to the District Court for a hearing to determine whether the witnesses were available to the parties. Stewart v. United States, 418 F.2d 1110 (D.C. Cir. 1969)

In Stewart, the appellant contended that the court erred in not instructing that the jury could infer from the government's failure to call Mr. Williams, as a witness, that his testimony would be unfavorable. There the court stated, at 418 F.2d 1110, 1114, that:

> "Williams, appellant's alleged accomplice, undoubtedly could have shed a great deal of light on the matters in issue at the trial. And if indeed he had testified adversely to the Government, the jury's verdict might well

have been different. The record, however, reveals little about Williams' "availability," whatever that word might imply in this case. We instructed, in Wynn v. United States, that the rendition of a missing witness instruction must await an informed decision that the absent witness is peculiarly available to the side against which the instruction is asked. It clearly follows that absent some other reason for refusing the instruction, the trial judge must inquire suitably into the witness' availability.

Here the trial court learned from defense counsel that he had made unsuccessful efforts of undetermined extent to ascertain Williams' whereabouts. But despite some indication from the prosecutor that Williams was amenable to production by the Government, the inquiry, drifted away to requests for other instruction without any sort of determination as to whether either party could produce Williams.

On this appeal neither party has recognized this deficiency. Each argues on the assumption that, with due effort, the other could have brought Williams into court. Thus appellant contends that Williams' cooperation with the police in identifying and locating appellant rendered him, in a practical sense, peculiarly available to the prosecution. The Government urges contrarily that availability is primarily a matter of ability to produce by subpoena.

Appellant's position draws considerable support from cases decided outside this jurisdiction. We ourselves have encountered the problem in some degree and in Richard v. United States, on the facts there, reached a conclusion favorable to the Government. On the other hand, we have indicated that in different circumstances another conclusion might be indicated. The parties' briefs do not focus upon our prior decisions in this context, and we have no information whatsoever as to Williams' relationship with either

> the Government or appellant subsequent to the time of the latter's arrest.
>
> The question whether the requested missing witness instruction was appropriate in this case is susceptible of firm resolution only upon full information as to William's availability to the parties, practically as well as physically. We accordingly remand this case to the District Court, retaining jurisdiction in the meanwhile, in order that such information may be developed and transmitted to us in the form of a supplemental record."

A clear analogy can be drawn between the facts herein and those in Stewart. As in Stewart, there was nothing in the record to indicate whether the witnesses were or were not available. The case against the defendant rested entirely upon the uncorroborated testimony of an accomplice and a state inmate, both of whom had agreed to testify in return for promises made by the government. Had the witnesses, who failed to testify, testified adversely to the government, the result may very well have been different as evidenced by the jury's notes and statements made during their deliberation, stating that they were deadlocked on four occasions (Tr 915, 937, 944, 949). In accordance with Stewart the case should be remanded for a hearing.

## POINT II

### THE APPELLANT ADOPTS CO-APPELLANT'S ARGUMENTS

Pursuant to Rule 28 (i) of the Federal Rules of Appellate Procedure, the appellant Olivo adopts all relevant arguments made and issues raised in his co-appellant's brief.

## CONCLUSION

The defendant Olivo's conviction should be reversed or in the alternative the case should be remanded for a hearing to determine whether the missing witnesses were available to either side.

Respectfully submitted,

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A 202 Affidavit of Personal Service of Papers

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UNITED STATES COURT OF APPEALS
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*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* *ss.:*

*I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452.*

*That on the* 11th *day of* November *19* 76 *at* 225 Cadman Plaza Brooklyn, N.Y.

*deponent served the annexed* appellant's brief *upon* David Trager

*the* attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

*Sworn to before me, this* 11th
*day of* November *19* 76

Beth A Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4525150
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E. Thomas

Print name beneath signature

KEVIN E. THOMAS